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No. 10,094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, owners of Diesel Screw "Blue Sky", her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

On April 15, 1939, the libellant, John Evanisevich, was employed as a fisherman on the Diesel Screw "Blue Sky" for the tuna season which was about to commence. Fishing for tuna occurred in Mexican waters. The libellant sustained his injury about a month subsequent to the end of the tuna season. Between the end of the tuna season and the time of the accident, the libellant was employed for the sardine season, which terminated during the early part of March, 1940. Between the time the vessel arrived in

the port of Los Angeles, subsequent to the tuna season, and September 22, 1939, the date upon which libellant sustained his injury, certain work had been done in and about the repair of a clutch connected with the Diesel engine; said clutch being removed from the vessel, sent to a machine shop on shore, then returned to the vessel and reinstalled therein. The libellant had assisted in taking the clutch out of the vessel. In addition to that work, the fishermen who were employed for the sardine season did certain work in and about preparing the sardine nets and gear used in the fishing venture.

The Diesel Screw "Blue Sky" is a fishing vessel eighty-one feet long with a twenty-foot beam of a gross tonnage of 99 tons and net tonnage of 51 tons. (Ap. 231.)

On the morning of September 22, 1939, the libellant and all of the crew of the "Blue Sky", excepting two, reported on board the vessel. The captain was absent, but Marco Cvitanich, one of the owners, and appellant herein, was aboard. During the morning, among other things, the boat was navigated within the harbor, testing the operation of the clutch. Libellant repaired a scoop net between eight A. M., and ten A. M. Lunch was served to the crew by the ship's cook between eleven A. M., and twelve o'clock noon.

There was a single mast on the vessel and there was a rope or cable rigging from the gunwale on each side of the mast, said rigging being connected to the mast at a point near the tip thereof and there were steps or rungs in said rigging. The vessel was moored

portside to the dock, there being no gangway, the libellant approached the gunwale at a point where the lower end of said rigging was attached to the gunwale or near the gunwale and climbed up the steps in the rigging to a point even with the dock. Then libellant placed one foot upon the dock. As this was done, his foot on the dock slipped and libellant grasped a part of the rigging with his left hand as his body dropped. He thus saved himself from falling to the deck of the vessel, but in so doing sustained serious spraining of his left shoulder and muscles connected therewith. (Ap. 149.)

On September 21, 1939, Captain Mason ordered the crew to report on board the "Blue Sky" at eight o'clock A. M. On the early morning of September 22, 1939, the ship's cook purchased for them, to the account of the "Blue Sky", food for the entire crew. (Ap. 242-243, 136, 144, 145.)

The libellant had remained on board, as it was very hot and he was awaiting the return of the Skipper to determine if all the work had been completed. (Ap. 150.)

The District Court, on this evidence, found "that it is true that on the 22nd day of September, 1939, just before the ship started upon its fishing season for sardine, and while the libellant was engaged in the service of his said ship in that he was in the act of departing from said ship after performance of his duties as a member of said ship's crew and while he was subject to call of duty as a member of the crew of said ship which was then and there lying in

the navigable waters of the Port of Los Angeles, slipped from a ladder and part of the equipment of said ship, and the adjoining wharf, severely injuring his left arm and shoulder". (Ap. 24, 25.)

APPELLEE'S REPLY TO APPELLANT'S CONTENTIONS AND ARGUMENT.

I.

The contention of the appellant that libellant was not injured while "in the service of the ship" is most ingenious; it, however, appears to rest wholly on dicta lifted from the case of *The Osceola,* 189 U. S. 158, 47 Law. Ed. 760, 23 S. Ct., 483, where the particular point of defining service of the ship was nowhere in issue. With equal logic, the libellant answers that the libellant was engaged in a continuous but interrupted voyage for the season, and that at any time the libellant was on the boat he was therefore necessarily in the service of the ship. *Liberty Land,* 1923 AMC 1213, *William Penn,* 1925 AMC 1316.

The American Beauty, 1924 AMC 531, decided by Neterer, D. J., is typical of the long line of cases holding that a fisherman fishing on a lay, hired for a season, is entitled to that lay for the entire period of the season. There is no doubt that the rulings of the Industrial Accident Commission have no applicability whatever to the instant case, both by reason of the locus of the accident and by reason of the law applicable to said locus. It needs no citation of authority to establish that where the injury occurred

wholly upon a ship that the matter is completely within the droits of the admiralty. From time immemorial, seamen, including fishermen seamen, have been given special rights.

> "* * * considering the favor always shown in admiralty to seamen. * * *"
>
> *I. S. E. No. 2,* 15 Fed. (2d) at 751.

> "Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. The Arizona v. Anelich, supra (298 U. S. 123, 80 L. ed. 1081, 56 S. Ct. 707), and cases cited; Calmar S. S. Corp. v. Taylor, 303 U. S. 525, 82 L. ed. 993, 58 S. Ct. 651. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."
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> *Socony Vacuum Oil Co. v. Smith,* 304 U. S. 424, at 431, 59 S. Ct. 262, 83 L. Ed. 265.

The Court stated in *The Henrietta,* 1933 AMC 1514, at 1516, 65 Fed. (2d) 940 (C. C. A. 1st):

> "The operation of fishing vessels under agreements, or lays, so called, for sharing the proceeds of the catch, has been familiar to those engaged in the business and to the courts for more than a century; and it has been held by the courts that, under a 'fishing lay', where the Captain employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch

and settling all the bills, he becomes the owner of the catch and settling all the bills, he becomes the owner *pro hac vice,* and that the crew is in the employ of the master and not the owner. *Carrier Dove* (C. C. A.), 97 Fed. 111, 112; *Adams v. Augustine,* 195 Mass. 289, 290, 291, 81 N. E. 192; *Costa v. Gorton-Pew Vessels Co.,* 242 Mass. 294, 136 N. E. 100; *Francis J. O'Hara, Jr., Case* (D. C.), 229 Fed. 312; *Mettacomet* (D. C.), 230 Fed. 208."

If the foregoing be accepted as the law, then it would make no practical difference whether the libellant endeavored to leave the ship five minutes after the completion of his assigned task or five hours later. He could have been ordered off the ship by the master and in fact was under the complete control of the master. The hazard present in leaving the ship was not increased by any tardiness, if such existed, in leaving the ship. The peril was not increased. See *The President Coolidge,* 1939 AMC 89, 23 Fed. Sup. 575.

II.

The equally ingenious device of the appellant in contending that a seaman injured while in the service of the ship is not entitled to wages beyond the end of the specific voyage, before the commencement of which, or during which, the injury occurs, rests upon the hope of the appellant that the case of *Enochasson v. Freeport Sulphur,* 7 Fed. (2d) 674, at 675, is not the law. If there ever was a case where the *hoped* for rule enunciated by the appellant would apply, that

would have been the case, for the facts show that the articles, although for six months service by the crew members, also provided that the master had the right and privilege of discharging any seamen at the termination of any voyage by giving thirty-six hours' notice; however, the court decisively followed the same rule as applied in the instant case by the District Court. Not only is the above case the law, but it has been such for more than a century. See *The Liberty Land,* 1923 AMC 1213; *The Emma Marie-Magellan,* 1933 AMC at 424-435; *O'Donnell v. Great Lakes D. & D. Co.,* 1942 AMC at 930, a case arising in the 7th C. C. A. May 22, 1942.

> "That record discloses that immediately after the injury, the injured seaman was removed to a hospital and there treated until August 27, 1940, when he was discharged at his own request and taken to his home. The court found as a fact that the appellant had been engaged in seasonal work under a contract for wages at $95 per month and his board and lodging valued at $1.40 per day and that the season began in March and ended in November, and concluded that the appellant was not entitled to maintenance, but awarded to appellant a sum equal to the amount he would have earned under the unexpired term of his contract at the rate of $95 per month. The argument is that appellant should recover, in addition to his wages, his maintenance at the rate of $1.40 per day.
>
> Unquestionably, the owner of a vessel is liable to a seaman injured in the service of his ship, for wages and keep during the employment, Calmar etc., v. Taylor, 303 U. S. 525, 1939 A. M. C. 341; Smith v. Lykes etc., 1939 A. M. C. 1122,

> 105 F. (2d) 604, comparable to that to which the seaman is entitled while at sea, The Henry B. Fiske, 141 Fed. 188; The Mars, 145 Fed. 446, 149 Fed. 729, and his right to maintenance may extend beyond the term of service, Calmar case, supra, 529."

The parallel between the above case lies in the fact that the employment of Evanisevich was for "the sardine season". *Allan v. S. S. Hawaiian,* 1940 A. M. C. 1136, 33 Fed. Sup. 985.

III.

Apparently appellant does not believe his fifth assignment of error has sufficient merit to argue the same, however, appellee cites *Gomes v. Pereira,* 1942 A. M. C. 481, 42 Fed. Sup. 328, as a complete answer to this assignment of error.

IV.

Answering appellant's Point IV, it needs no statement of authority to show that the State Workmen's Compensation Act has no applicability whatever for the work of the libellant in repairing a scoop net occurred on the ship and in navigable waters and as part and parcel of his duties to that ship, and in furtherance of the main purpose for which he was hired, to wit, fishing.

The appellant's *hope* that the Supreme Court, may, the next time this point is squarely presented, overrule the case of *So. Pac. Co. v. Jensen,* 244 U. S. 205,

61 L. Ed. 1086, 37 S. Ct. 524, L. R. A. 1918C 451, Ann. Cas. 1917E 900, 14 N. C. C. A. 597, certainly present no reason why this Court should attempt to anticipate such a move; to do so would certainly be a novel departure from the rule of *stare decisis.*

CONCLUSION.

The facts show that Evanisevich was employed for the sardine season, a fixed term, during which he was bounden to the ship and the ship to him. He was injured on the ship while endeavoring to leave her at a time when it was within his right to do so. The injury occurred on the ship which lay in navigable waters of the United States. The shares earned were agreed upon and fixed by the lower Court. We know of no better way to conclude than to quote from Benedict on Admiralty, Sixth Edition, Volume I, page 253, paragraph 83:

> "From very ancient times it has been held that a sailor who had fallen ill or been injured in the service or the ship is entitled to wages until the termination of his contract, and to his maintenance and cure at least as long as the voyage is continued, or to the end of his contract, regardless of whether the injury was occasioned by the negligence, his own or another's, or by simple accident."

Dated, San Pedro, California,
October 14, 1942.

Respectfully submitted,
DAVID A. FALL,
Proctor for Appellee.